AGENDA DATE: 2/18/94
3/4/94

State of New Jersey
Board of Regulatory Commissioners
CN 350
Trenton, NJ 08625-0350

APPLICATION OF JERSEY CENTRAL POWER & LIGHT COMPANY FOR APPROVAL OF THE POWER PURCHASE AGREEMENT BETWEEN JERSEY CENTRAL POWER & LIGHT COMPANY AND FREEHOLD COGENERATION	)	ELECTRIC ORDER DENYING STAY AND ESTABLISHING PROCEDURAL SCHEDULE
AND	)	
VERIFIED PETITION OF FREEHOLD COGENERATION ASSOCIATES, L.P., FOR APPROVAL OF A JOINT AGREEMENT BETWEEN BOARD OF REGULATORY COMMISSIONERS STAFF & FREEHOLD COGENERATION ASSOCIATES, L.P.	)	DOCKET NO. EM92030359

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter is before us for consideration of further procedures consistent with our January 5, 1994 Order of Denial in the above matter. In that Order, the Board rejected a Joint Agreement between Freehold Cogeneration Associates, L.P. (Freehold) and the Board's Staff for certain modifications of the Power Purchase Agreement (Agreement

or PPA) between Freehold and Jersey Central Power and Light Company (JCP&L) because we found that, even with the proposed modifications, the Agreement remains far in excess of current avoided cost forecasts and is not otherwise beneficial to ratepayers. We further ordered that Freehold and JCP&L enter into good faith negotiations to attempt to reach agreement on a modification of the purchase rates contained in the PPA or an appropriate buyout of the Agreement. We further indicated that if these negotiations were not successful within 30 days, the Board would commence a proceeding and hold hearings to consider what, if any, further action we can and should take, including possible reconsideration, modification or revocation of our July 1992 Order in the above matter, wherein we approved the Agreement and granted ratemaking approval of the pass-through of the costs associated with the Agreement to JCP&L's customers.

While Freehold and JCP&L did undertake some limited negotiations, they were not able to reach agreement on a modification of the Agreement or a buyout within the 30-day timeframe. The Board was so advised by a letter from JCP&L dated February 3, 1994. In its letter, JCP&L requested that the Board commence a proceeding as set forth in its January 5, 1994 Order and transmit the matter to the Office of Administrative Law (OAL) for hearings.

By letter dated February 10, 1994, Freehold responded to JCP&L's letter and, pursuant to N.J.A.C. 14:1-8.7, requested a stay of the proceedings referred to in the Board's January 5, 1994 Order and the hearing requested by JCP&L in its letter. While Freehold asserts that the parties should be given more time to negotiate, the basis of its request for a stay is to allow the federal court to rule on its pending complaint and motion for summary judgment in the United States District Court for the District of New Jersey. Freehold's complaint, filed on January 19, 1994, seeks declaratory judgment that the Board's January 5, 1994 Order directing negotiations among the parties and "threatening revocation of its prior regulatory approval" are preempted by the Public Utilities Regulatory Policies Act of 1978 (PURPA), 16 U.S.C.A. Sections 796 and 824a-3 et seq., and the regulations promulgated pursuant thereto by the Federal

Energy Regulatory Commission (FERC). Freehold also seeks an order permanently enjoining enforcement of these provisions of the January 5, 1994 Order. On February 8, 1994, Freehold filed a motion for summary judgment with the federal court, seeking an order granting summary judgment in its favor on the issues raised in its complaint and request for injunctive relief.

Freehold has requested that the Board suspend any proceedings on the PPA pursuant to its Order of January 5, 1994 until the question of preemption is definitely resolved. Freehold contends that if the Board proceeds with hearings affecting the PPA while the preemption issue is before the federal court, Freehold will suffer irreparable harm. Freehold contends that the proposed hearings will create a "cloud on the terms of the PPA" which will create uncertainty about this project in the financial community. Freehold also cites the burden and expense of defending itself before the Board.

By letter dated February 17, 1994, JCP&L responded to Freehold's February 10, 1994 letter and opposed the request for a stay. JCP&L contends that Freehold has not met the legal requirements for a stay, in that it has not demonstrated a likelihood of success on the merits or a showing of irreparable harm to justify a stay. Neither has it demonstrated that the legal right underlying its claim is well settled or that the balance of the equities weighs in its favor. JCP&L urges the Board to deny the request for a stay and to proceed with the contemplated hearings in light of the significant and adverse financial impact on JCP&L and its customers stemming from the PPA. By letter dated February 17, 1994, Rate Counsel also opposed the request for a stay.

Discussion

The issues before us at this time are whether to grant Freehold's request for a stay of further proceedings before the Board, pending resolution of Freehold's complaint in federal court and, if not, what the scope and schedule of our proceedings should be.

Pursuant to N.J.A.C. 14:1-8.7(d), a stay will be granted for "good cause shown." The criteria for determining good cause for the granting of emergent relief such as the imposition of a stay pending appeal are well settled. For a stay to be granted, the moving party must show:

1. that the movant will suffer immediate and irreparable harm if a stay is not granted;

2. that there is a reasonable probability that the moving part will succeed on the merits;

3. that the legal right underlying the movant's claim is well settled; and

4. that the balance of the equities in granting or denying relief weighs in the movant's favor.

Crowe v. DeGioia 90 N.J. 125 (1982); Zoning Board of the Township of Sparta v. Service Electric Cable T.V. of N.J. Inc., 198 N.J. Super. 170 (App. Div. 1985); Doumani v. Casino Control Commission of New Jersey, 614 F. Supp. 1465 (D.N.J. 1985).

A review of Freehold's request for a stay in light of these criteria reveals an inadequate showing to justify the imposition of a stay. Based on our review of the record in this matter, we do not believe that Freehold has satisfied even a single one of the above criteria.

First, Freehold has failed to demonstrate that it will suffer any immediate or irreparable harm absent a stay of the Board's Order. Freehold claims that if the Board proceeds with hearings there will be a cloud on the terms of the PPA, which will create uncertainty in the financial community. However, in November 1993, in support of the Joint Agreement between Freehold and Staff, Freehold asserted that lenders would not make commitments to finance the project until the rate issue was resolved. It is clear to us that uncertainty regarding this project has existed in the financial community for some time because of the uneconomic nature of the project and that the uncertainty will continue to exist until all issues involved in this matter are resolved.

Freehold also claims that the federal court will be able to resolve this matter more expeditiously than the Board in order to remove the uncertainty. This is unlikely if we were to retain this matter at the Board and adopt the procedural hearing schedule as set forth below. This schedule would enable the matter to be ready for Board consideration in late April, after development of a full record and evidentiary hearing(s). Freehold had originally proposed an anticipated return date of March 28, 1994 for its motion for summary judgment in federal court. Moreover, any decision rendered by the United States District Court will likely be appealed by the unsuccessful party. Clearly, whether the Board grants a stay or not, uncertainty about the PPA will likely exist for some time, until the entire matter is finally resolved and all appeals are completed. If anything, having the Board retain and hear this matter on the schedule set forth below may well bring the matter to a more expeditious resolution than granting a stay at this time.

Second, Freehold has not conclusively demonstrated that it is likely to prevail on the merits in federal court. The issue raised by Freehold's complaint and motion for summary judgment has not been conclusively decided by the courts. As stated in JCP&L's responses in opposition to the request for a stay, Freehold's preemption arguments are far more complex and uncertain than Freehold Asserts. Freehold argues that the Public Utility Regulatory Policies Act of 1978 (PURPA) and federal regulations adopted thereunder by the Federal Energy Regulatory Commissioners, preempt the actions contemplated by the Board citing the recent decision of the Oklahoma Supreme Court in Smith Management Inc. v. The Corporation Commission and Public Service Commission of Oklahoma. The Board notes that the Oklahoma decision was decided by a 6-3 vote and that, as pointed out by JCP&L in its January 7, 1994 letter brief, a review of the Oklahoma decision discloses numerous factual and legal distinctions from the issues facing the Board in this case. Primarily, the cogenerator in the Oklahoma decision did not have a negotiated power purchase agreement with the utility. Moreover, as described above, the FERC regulations provide that an electric utility and a cogenerator can agree to terms and conditions that differ from those in the regulations. The presence of an express clause in the PPA wherein the

parties, without any reservations, agreed to certain procedures in the event the Board were to disallow charges associated with the agreement from being passed on to the JCP&L ratepayers, casts doubt on Freehold's claim that it is likely to prevail on the merits. In addition, as JCP&L notes in its letter opposing a stay, there appears to be good cause for the federal court to dismiss Freehold's complaint on abstention and other grounds, including comity, election and exhaustion of remedies. If this occurs, the merits of Freehold's preemption argument will not be reached in federal court until after the Board conducts a proceeding, if at all.

The balance of the equities is clearly not in Freehold's favor. If we deny the request for a stay, Freehold will have a full and fair opportunity to raise its preemption argument and other legal and factual arguments against further Board action in a proceeding before the Board. In addition, Freehold's alleged burden and expense in "defending" itself before the Board is not sufficient reason for a stay. For these reasons, Freehold's request for a stay is HEREBY DENIED.

In its January 5, 1994 Order, the Board stated that if negotiations between Freehold and JCP&L failed, it would hold a hearing pursuant to N.J.S.A. 48:2-40 to consider whether to modify or revoke its Order approving the PPA and the ratemaking pass-through of the costs associated therewith to JCP&L's customers. N.J.S.A. 48:2-40 grants the Board at any time the power to revoke or modify an order made by it. Tp. of Deptford v. Woodbury Terrace Sewerage Corp. 54 N.J. 418, 425 (1969); N.J. Bell Tel. Co. v. Bd. of Pub. Util. Comm's. 12 N.J. 568, 579 (1953) Central R. Co. of N.J. v. Dept. of Public Utilities, 7 N.J. 247, 254-255 (1951); Sudler v. Environ. Disposal Corp., 219 N.J. Super. 52, 62 (App. Div.) certif. denied 109 N.J. 56 (1987). The Board also possesses authority to "[i]nvestigate upon its own initiative . . . any matter concerning any public utility." N.J.S.A. 48:2-19. The Board also has a continuing obligation under N.J.S.A. 48:2-21 to ensure that a utility's rates are just and reasonable. In re Revision of Rates by Redi-Flo Corp. 76 N.J. 21 (1978).

While we are mindful of the need for rate stability in purchase power agreements and while reconsideration of our

ratemaking treatment of the rates associated with such an agreement is not a step to be taken lightly, given the magnitude of the discrepancy which has developed between the rates under this Agreement and current projections of avoided costs, combined with the fact that the project has not yet been financed nor commenced construction, we believe that our continuing authority to assure that the rates of JCP&L are just and reasonable requires us to reopen the record in this matter to consider what, if any, actions we can and should take at this time consistent with applicable law and our regulatory mandate under N.J.S.A. 38:2-21.

In light of the substantial decline in avoided costs since the Board's approval of the Freehold PPA, the failed negotiations between Freehold and JCP&L and the Board's powers under N.J.S.A. 48:2-21 and 48:2-40, the Board HEREBY DETERMINES to retain this matter and to hold evidentiary hearings to consider the following issues:

1. The status of the Freehold project;

2. The viability of the project, including the prospects for meeting remaining milestones and obtaining financing;

3. The economics of the project, including the amounts expended to date, the projected costs of the project, a comparison of the rates under the PPA to JCP&L's most current avoided cost estimates, and the impact of the costs associated with the PPA on ratepayers;

4. Whether the Board can reconsider, modify or revoke its 1992 Order approving the PPA and allowing for the pass-through of the rates associated with the PPA to JCP&L ratepayers;

5. Whether the Board should reconsider, modify or revoke its 1992 Order approving the PPA setting the level of rates associated with the PPA permitted to be passed through to JCP&L ratepayers, and if so, to what extent;

6. Whether the Board can order a reasonable buy-out of the PPA;

7. Whether the Board should order a buy-out of the PPA and if so at what price.

We note that Freehold's preemption arguments can certainly be raised in the context of these issues. Accordingly, we HEREBY DENY Freehold's request for a stay of the proceedings and we will commence a proceeding to consider the above issues.

At our February 18, 1994 agenda meeting we established a procedural schedule which among other things, set the date for prefiled testimony as March 14, 1994, established hearing dates on March 21 and 22, 1994 and dates for briefs and reply briefs on March 31, 1994 and April 6, 1994, respectively. On February 28, 1994, Freehold filed an Emergent Motion for Reconsideration of the Board's Oral Decision of February 19, 1994, which established a scheduled for discovery, hearings and briefing. Freehold characterizes the hearing schedule as being highly abbreviated. It asserts that the Board expedited the schedule based on two incorrect assumptions. The first being that the parties are familiar with the issues involved. Freehold asserts that the legal, policy and factual issues are far more complex than the Board assumed. Specifically Freehold is concerned that the parties be given sufficient time to present arguments on the possibility that any Board action to modify or revoke its approval of the PPA would be preempted by federal law and/or be contrary to state and federal constitutional provisions and that the parties have the opportunity to fully explore the economics of the Freehold cogeneration project. Freehold also put for the loss of its long-time counsel as a reason for giving them additional time.

The second assumption which Freehold refers to is that the hearing schedule takes into account Freehold's previously stated concern that financing for the project will be difficult to obtain until the matter is resolved. Freehold expresses concern that if the purchase terms are altered it will not be able to obtain financing. It now argues that it should

be given "a complete opportunity to develop a full record in an orderly manner."

Based on these arguments, Freehold asks the Board to alter the hearing schedule in one of three ways. First Freehold asks that the Board transmit the matter to the OAL so that a complete record can be developed. Alternatively, Freehold asks that the schedule be restructured to provide for a phased consideration of the issues starting with the extent of the Board's authority under federal and state law. Freehold's last request is that the submission of pre-filed testimony be deferred two weeks until March 28, 1994 so the district court be given time to rule on Freehold's motion for summary judgment[1] and the parties be given sufficient time to assimilate the material obtained through discovery and obtain the services of non-party experts and other witnesses.

Replies to Freehold's Motion were filed by JCP&L and Rate Counsel. Both JCP&L and Rate Counsel objected to Freehold's request to send the matter to the OAL and for a phased consideration. Both JCP&L and Rate Counsel expressed a desire to keep the process moving. However, JCP&L did not object to a two week delay in the schedule, nor did Rate Counsel specifically object.

Given our prior determination to hear this matter directly, we remain convinced that Freehold's request that the matter be transmitted to the OAL be denied. N.J.S.A. 52:14F-8(b) provides than an Administrative Law Judge shall

---

1 At a conference call with United States District Court Judge Mary Little Parell held on Tuesday, February 22, 1994, the Judge set Oral Argument for Wednesday, March 14, 1994, and indicated she would attempt to rule from the bench after Oral Argument on Freehold's Motion for Summary Judgment and the cross-motions to dismiss. At that time the Judge also expressed the hope that the Board would consider Freehold's request for a two-week extension favorably.

not be assigned to hear "[a]ny matter where the head of an agency, a commissioner or several commissioners, are required to conduct or, determine to conduct the hearing directly or individually." An agency's determination to hear a case directly rather than to transfer the case to the OAL is within the agency's discretion, and the agency head clearly has the right not to transfer a case to the OAL. In re Uniform Admn'n Procedure Rules, 90 N.J. 85, 90-92, 104 n. 8 (1992); Unemployed-Employed Council of N.J. Inc. v. Horn, 84 N.J. 646, 654 (1980); Frank v. Ivy Club, 228 N.J. Super. 40, 55 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. denied, 498 U.S. 1073, 111 S.Ct. 799, 112 L.ed. 2d 860 (1991); Matter of Cole, 194 N.J. Super. 237, 245-45 (App. Div. 1980), app. dismissed, 84 N.J. 433 (1980).

Accordingly the Board HEREBY REAFFIRMS its determination to hear this matter because of the important legal, factual and policy decisions involved and because there is no requirement that the matter be transmitted to the OAL.

The Board is convinced that Freehold's request that the hearing schedule provide for phased consideration of the issues should be denied. The Board will give all parties a full and fair opportunity to raise all issues relevant to this matter. Freehold has already asked for and has been given additional time by counsel for the other parties for the submission of discovery requests. By agreement of all parties, the date for discovery requests was moved from Friday February 25, 1994 to Tuesday March 1, 1994 and the date for responses was moved from Friday March 4, 1994 to Tuesday March 8, 1994. This action allows Freehold's new counsel the opportunity to familiarize himself with the issues. In addition, Freehold has other counsel which have continued to work on the matter and should be familiar with the issues involved in discovery.

However, the Board will grant Freehold's last request and defer the submission of pre-filed testimony for two weeks. Such action would defer all other phases of the hearing for two weeks. Deferral of submission of pre-filed testimony accedes to Judge Parell's request that in the interests of comity the Board grant Freehold an extension and

would likely avoid a filing by Freehold for an emergent stay in federal court. A two-week delay could also see resolution of the federal district court case in either party's favor. If resolved in Freehold's favor all concerned parties will have been spared unnecessary work, pending the outcome of any subsequent appeals which may result. If the Board prevails, the hearing schedule can proceed without the interference that could result from a simultaneous federal court proceeding. Deferral also gives the parties more time to fully prepare themselves for the remainder of the hearing schedule. The delay that would result from such deferral is minor and still allows the Board to resolve this matter expeditiously.

Accordingly, we HEREBY DENY Freehold's request to transmit this matter to the OAL and for a phased consideration of the issue before the Board. We HEREBY GRANT Freehold's request for a two week delay in the filing of prefiled testimony and subsequent hearing dates and briefs. Accordingly, the revised procedural schedule will be as follows:

Responses to the first round of testimony:

Tuesday, March 8, 1994
Monday, March 28, 1994
Wednesday, April 6, 1994
Thursday, April 7, 1994 at 9:30 a.m. at the Board's hearing room Two Gateway Center, Newark, NJ

Briefs: Friday, April 15, 1994
Reply Brief: Thursday, April 21, 1994

The parties may continue to exchange follow-up discovery requests up through the beginning of the hearings. The parties are directed to cooperate to respond to these requests as promptly as possible, in light of the above schedule.

JCP&L is directed to provide appropriate notice of the hearings consistent with applicable law.

Copies of all documents should be served on all parties no later that 5:00 p.m. on the above dates. Copies

should also be filed with the Board at its Trenton offices with copies to Board's Staff in Newark and the Attorney General's Office in Newark. Parties should be prepared to execute appropriate confidentiality agreements, if necessary. If there are any disagreements among the parties concerning discovery or other procedural matters, these should be brought to the attention of the advising Deputy Attorney General, with copies to all parties. If any such matter cannot be resolved among the parties, the issue will be brought back to the Board's agenda for resolution.

The above schedule is, in our view, reasonable and necessary in light of the cloud of uncertainty which Freehold contends now hangs over the project. We further believe that the schedule is reasonable because the parties' familiarity with the subject matter obviates the need for a lengthy and extensive discovery process.

Concurrent with its filing of its Emergent Motion for Reconsideration of the Board's hearing schedule, Freehold filed a Motion for Reconsideration of the Board's Order of January 5, 1994 concerning this matter. The issues raised in

that Motion will be considered by the Board at a future meeting and memorialized in a separate order.

DATED: March 7, 1994

BOARD OF REGULATORY
COMMISSIONERS

BY: /s/

HERBERT H. TATE, JR.
PRESIDENT

/s/
CARMEN J. ARMENTI
COMMISSIONER

/s/
DR. EDWARD H. SALMON
COMMISSIONER

ATTEST:

/s/
JULIE FORD
ACTING SECRETARY